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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

J.R. & A.R. SERVICES, INC., Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B245081 (Los Angeles County Super. Ct. No. BC446460)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Deirdre Hill, Judge. Reversed and remanded.

C. Timothy Lashlee for Plaintiff and Appellant.

Michael C. Feuer, City Attorney, Brian I. Cheng, Deputy City Attorney for Defendant and Respondent City of Los Angeles.

Tabatabai & Blonstein, Farzad Tabatabai and Robert S. Blonstein for Defendant and Respondent KOP Holdings, Inc.

INTRODUCTION

J.R. & A.R. Services, Inc. (J.R.) appeals from a judgment entered against it following the trial court's sustaining of the demurrer of KOP Holdings, Inc. (KOP) to the first amended complaint (FAC) and granting of the motion for judgment on the pleadings of the City of Los Angeles (the City) regarding the FAC. J.R. contends that the trial court erred because J.R. stated facts sufficient to constitute the causes of action pleaded in the FAC: the taking of property without due process of law, negligence and declaratory relief asserted against the City; "Restitution, Quasi-Contract Recovery," conversion and declaratory relief asserted against KOP.

We hold that the trial court did not err in granting the City's motion for judgment on the pleadings as to all of the causes of action asserted against it, and in sustaining KOP's demurrer as to the cause of action for declaratory relief; and the trial court erred in sustaining KOP's demurrer as to the causes of action "Restitution, Quasi-Contract Recovery" and conversion. We reverse the judgment, and remand the matter to the trial court to provide J.R. with an opportunity to amend the FAC.

FACTUAL BACKGROUND[1]

J.R. alleged in its FAC that in June 1998, it purchased "a residential duplex consisting of two rental units" (property) in Los Angeles and in or about January 2000, under the Utility Maintenance Program (UMP), the City began accepting "rent payments from the tenant occupants of the real property under UMP case #UP0624." "While UMP case number UP0624 was open, the City . . . received monthly rent from the tenants of the Property and deposited said rents in an escrow account and administered said account. Thereafter, the City. . . charged and deducted a maintenance fee from each payment

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[1] J.R. requests that this court take judicial notice of City of Los Angeles Municipal Code (LAMC) sections 155.00-155.09. The City requests that we take judicial notice of J.R.'s complaint, LAMC sections 155.00-155.09, LAMC sections 162.00-162.12, a copy of the City's public file reflecting that on October 29, 2008, the City adopted a resolution to remove the subject property from REAP and ordered payment of the remaining escrow funds to the current landlord, and LAMC sections 151.00-151.02. We grant the requests.

received from the tenants and paid utility bills to the [City's Department of Water and Power (DWP)]." "The total rent paid by the tenants, collected and retained by the City . . . in escrow, greatly exceeded the payments, charges, distributions, transfers and other uses of funds made by the City . . . during the time the escrow was open." "All rent payments received into the said escrow accounts accrued and were paid while [J.R.] was the owner of the Property. At all times, from the date the first payment was paid into the escrow account to the present, all such payments belonged to and continue to belong to [J.R.] and to no other. At no time did [J.R.] assign, transfer, forfeit or otherwise give up or lose its right to or ownership of such payments"

J.R. alleged that in October 2007, Andrew Kwiat "acquired title" to the property, and J.R. owned the property prior to Kwiat's acquiring it.[2] In November 2007, KOP acquired title to the property from Kwiat pursuant to a quitclaim deed.

J.R. alleged that in June 2009, it sent a letter to the Los Angeles Housing Department (LAHD) requesting an accounting of all rents received from the tenants of the property and all expenses paid in connection therewith during the pendency of UMP case number UP0624 concerning the subject property, and requested a check for the balance. "No reply was received to the request, the accounting [was] never produced and no funds were paid to [J.R.]" J.R. made numerous telephone calls to the LASD, and "left several messages" in an attempt to obtain a response to the letter, but the telephone "calls were never returned." On February 12, 2010, J.R. was informed by an LAHD employee that LAHD closed the UMP case concerning the property, and that "he could not give [J.R.] any specific information regarding the release of the funds except that they had been mailed out." J.R. alleged on information and belief that KOP submitted "paperwork" to the City required by the City before it would pay the remaining escrow funds to KOP; after September 29, 2009, the City "paid the remaining escrow funds to

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[2] The trial court granted KOP's request for judicial notice that included a "Tax Deed to Purchaser of Tax-defaulted Property," providing that the property was sold to Kwiat for $300,000 by the treasurer and tax collector of Los Angeles County for non-payment of taxes (tax sale).

KOP;" and prior to February 12, 2010, [J.R.] did not receive notice or information that "the funds had been paid." On February 26, 2010, J.R. filed with the City a claim for damages for the failure to pay to J.R. the escrow funds held at the close of the UMP case concerning the property, and the City provided notice to J.R. that the claim had been "rejected."

PROCEDURAL BACKGROUND

J.R. filed a complaint against the City, LAHD and KOP. The first through third causes of action were asserted against the City and LAHD. The first cause of action was for taking of property without due process of law; the second cause of action was for negligence; and the third cause of action was for declaratory relief.

The complaint's fourth and fifth causes of action were asserted against KOP. The fourth cause of action was for unjust enrichment; and the fifth cause of action was for declaratory relief.

The complaint attached J.R.'s Government Code section 915 et seq. claim (government claim) submitted against the City on February 26, 2010. In describing how the damage or injury occurred, J.R. stated in its government claim that its "tenant[s] paid rent into UMP program from approx. 1-00 to approx. 10-07. After [the] property [was] removed from UMP program, [J.R.] filed [a] demand for payment of [the] remaining funds. [The] City paid [the] funds to another instead and refuses to pay [J.R.]" In describing the particular act or omission J.R. claims caused the injury or damage, J.R. stated in its government claim, "[The] [f]ailure to pay UMP funds to the rightful owner, i.e., [J.R.]." Characterizing J.R.'s government claim as one "concerning the alleged failure 'to pay UMP funds to the rightful owner,'" the City denied the claim.

The City answered the complaint, and KOP filed a demurrer to it. The trial court sustained KOP's demurrer with leave to amend.

J.R. filed a FAC against the City, LAHD[3] and KOP. The FAC is at issue in this appeal. Each of the causes of action contained in the FAC incorporates by reference the prior paragraphs of the FAC. The FAC prays for $32,921.79 in damages plus deductions from the escrow account "not provided for by law or not properly documented," interest, imposition of a constructive trust against KOP in a sum to be determined at trial, costs of suit, and such other relief as the trial court deems necessary and proper.

Under the FAC's introduction heading,[4] J.R. alleged generally that the City was "under a mandatory, non-discretionary duty to not deprive [it] of [its] property without due process of law." J.R. alleged that article I, section 7, subdivision (a) of the California Constitution states that a person may not be deprived of property without due process of law, and Government Code section 815.6 states that a public entity is liable for an injury proximately caused by the public entity's failure to discharge a mandatory duty imposed by an enactment designed to protect against the injury, unless the public entity establishes that it exercised reasonable diligence in discharging the duty.

The first through third causes of action of the FAC were asserted against the City.[5] The first cause of action was for taking of property without due process of law, alleging that, "[LAMC] Section 155.07B[6] [providing in part that "the release of accumulated REAP [i.e., Rent Escrow Account Program] funds to the landlord(s) subject to the

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[3] J.R. states in its opening brief, and the City does not dispute, that "On April 6, 2011, [J.R.] and the City stipulated in open court to the dismissal without prejudice of [LAHD]. The City stipulated that [LAHD] is a department of the City. [J.R.] believes that [LAHD] was dismissed without prejudice pursuant to the stipulation, although this fact does not appear in the Clerk's Transcript."

[4] The allegations contained under the FAC's introduction heading are identical to the allegations under the complaint's introduction heading.

[5] The allegations contained in the FAC's causes of action asserted against the City are identical to the allegations contained in the complaint's causes of action asserted against it.

[6] All statutory citations are to LAMC unless otherwise noted.

provision of the landlord(s)'s Social Security Number or Tax Identification Number"], and such other statutes, codes and regulations as [the City] may have relied upon [to provide the funds to KOP instead of J.R.], are . . . either unconstitutionally ambiguous and vague as to who the landlord is or provide for a taking of property without due process of law and instead delivering such property, in this case the remainder of the escrow funds, to a person or entity that did not own the Property when such funds were paid into the escrow account and at no time acquired ownership or any other interest of or in such funds by assignment, purchase transfer or otherwise." J.R. has been damaged "[a]s a result of the unconstitutional taking and violation of [the City's] mandatory and non-discretionary duty . . . ."

The second cause of action was for negligence, alleging that the City was the custodian of funds belonging to J.R. and "[as] such, [the City] owed a duty to [J.R.] to manage such funds without injury to [J.R.] Prior to the distribution of the funds to KOP, [the City] had knowledge that there was a dispute as to the ownership of the funds or an objection to the payment of the funds. As such, [the City] owed a duty to [J.R.] to resolve such dispute or interplead such funds and/or seek a judicial determination of the owner or such funds prior to paying out such funds. When [the City] paid out said funds to another, . . . [the City] breached [its] duty to [J.R.]"

The third cause of action was for declaratory relief, seeking a judicial declaration of the owner of the remaining escrow funds, whether the withdrawals of the funds were proper, whether the City wrongfully paid such funds to a person or entity other that J.R., and whether J.R. was damaged.

The fourth through sixth causes of action were asserted against KOP. The fourth cause of action was for "Restitution, Quasi-Contract Recovery" alleging on information and belief that the City "paid the escrow funds remaining in the UMP account in the sum of $32,921.79, to KOP . . . ." J.R. alleged that the rents paid by the tenants to the said escrow account were its personal property, and "[b]y receiving and retaining the $32,921.79, [KOP] obtained an identifiable sum of money . . . to which [KOP was] not

entitled, for which [it] gave no consideration and for which [KOP] are indebted" to J.R. "[I]t is unjust for [KOP] to continue to retain such funds," and J.R. has been damaged.

The fifth cause of action for conversion alleged that "the retention of the funds by [KOP] is wrongful and constitutes conversion." The sixth cause of action was for declaratory relief in which J.R. sought a judicial declaration of the owner of the remaining escrow funds, and whether J.R. was damaged.

The City answered the FAC, and KOP filed a demurrer to it on the grounds that each of the causes of action asserted against KOP failed to state facts sufficient to constitute causes of action against KOP. KOP filed a request for judicial notice in support of its demurrer, requesting that the trial court take judicial notice of the City's notice of acceptance of the property into UMP/REAP, dated February 18, 2000, stating that "[LAHD] has accepted [the] property into the [UMP] because of unpaid delinquent utility bills owed to the [DWP] by the landlord;" tax deed to purchaser of tax-defaulted property, filed with the Los Angeles County official records recorder's office on October 19, 2007, stating there was a tax lien on the property and a default of payment of the levied taxes on the property, and the property was sold by the Los Angeles County treasurer and tax collector to Kwiat; the City's notice of general manager's hearing and notice of acceptance into [REAP], dated October 9, 2007, stating that the property was placed into REAP "because the property [was] the subject of one or more Orders issued by [**LAHD**], and the time allowed for compliance . . . [had] expired without compliance;" the LAHD's notice of removal of property from REAP, dated October 31, 2008; and sections 155.00 through 155.09, and 162.01 through 162.08.

J.R. opposed the demurrer, stating, inter alia, that "[J.R.] is prepared to amend its [FAC], if necessary, to state the following: 'When [J.R.] became the owner of the Property, the [DWP] refused to accept [J.R.'s] utility payments due to DWP's misunderstanding as to the owner of the property. As a result, [J.R.] voluntarily allowed the property to be accepted into the UMP.'"

At the hearing on the demurrer, following argument by counsel, the trial court stated, "The tentative [ruling] will be the ruling." The record before us does not contain

the trial court's tentative ruling. Following the hearing on the demurrer, the trial court issued a minute order stating that KOP's request for judicial notice was granted and the demurrer was sustained without leave to amend.

The City filed a motion for judgment on the pleadings. J.R. opposed the motion, requesting leave to file an amended complaint against the City if the trial court deemed the FAC to be insufficient. J.R. did not state in what respects it proposed to amend the FAC. The City and J.R. filed requests for judicial notice.

At the hearing on the motion for judgment on the pleadings, the trial court took the matter under submission, and thereafter issued a written ruling granting the motion without leave to amend. The record does not disclose whether the trial court ruled on the requests for judicial notice made by the City and J.R.

As to the first cause of action for taking property without due process, the trial court stated in its written ruling that "As a matter of law, [J.R.] did not have an interest in the escrow contents at the time the City turned over the money to KOP. [LAMC section] 162.08 regulates the return of rents collected in escrow at the termination of REAP. This code section states at sec. 162.08 D1: If the City Council terminates the escrow account, any funds shall be paid [in an order specified in the section and] [¶] . . . [¶] [a]ny remaining funds shall be returned to the current landlord. [¶] The code explicitly states that remaining funds are to be returned to the 'current landlord.'. . . [J.R.] did not fall under the definition of 'current landlord.' [¶] Moreover, [J.R.] lacks any cognizable injury and Article III standing. The allegations show that [J.R.] did not own the property when the escrow account was closed. [¶] [J.R.] argues that the City's ordinance was either unacceptably vague because the UMP ordinance does not define 'landlord' and the word 'landlord' as defined in section 151.02 of the REAP ordinance can only relate to [J.R.] [J.R.] also contends that the ordinance is constitutionally void because there is no claim procedure or a provision for a hearing. 'It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and

irrational way. We therefore consider the sufficiency of the evidence of a substantive due process violation arising from arbitrary or irrational actions.' Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal.App.[4th 687, 709]. Here there are no allegations that the City acted arbitrar[ily] or irrationally."

As to the second cause of action for negligence, the trial court stated in its written ruling, that "Negligence is not a cognizable theory of liability against the City. There is no common law theory of negligence liability. Plaintiff fails to allege any statutory liability. [¶] Defendant also argues that the City has immunity when performing official acts. The City Council removed the property from REAP and closed the escrow account on 10/29/08. A date after plaintiff lost the property."

As to the third cause of action for declaratory relief, the trial court stated that, "Here, plaintiff is attempting to address a "past wrong," which is improper under a cause of action for declaratory relief. The allegations are insufficient because there is no actual controversy. [¶] Further, a cause of action for declaratory relief cannot be used as an attack upon an order of an administrative agency. Escrow Owners Assoc., Inc. v. Taft Allen (1967) 252 Cal.App.2d 506, 510." The trial court granted the motion without leave to amend.

Judgment was entered against J.R.[7] This appeal followed.

DISCUSSION

A. Standard of Review

In reviewing a judgment on the pleadings, we apply the same rules governing the review of a demurrer dismissed. (*Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 32.) "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing

[7] There was no specific reference to KOP in the judgment. We asked the parties for their positions on this omission, but received no reply. We deem that the judgment is appealable as to KOP.

court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 966-967.) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

B. Applicable Law

1. UMP

Plaintiff alleges that sometime between September 29, 2009, and when plaintiff learned of it on February 12, 2010, the City paid the balance of the escrow funds—$32,921.79—to KOP. During that time, the LAMC set forth the UMP in sections 155.00 et seq. Section 155.00 provided that, "Many Los Angeles City tenants reside in master-metered apartment buildings and pay for essential utility service through their rent payment to the landlord. The landlord has the financial obligation to pay the Department of Water and Power for utility services. [¶] A crisis now exists in the City. There are approximately 11,000 master-metered apartment buildings whose owners have failed to pay for utility services. Tenants who pay rent which include the cost of utilities face utility service termination due to the diversion of funds by the owners. The termination of utility service to a master-metered apartment building would make the building uninhabitable pursuant to California Civil Code Section 1941.1 *et seq*. [¶] The purpose of this ordinance is to offer tenants an alternative to service terminations in master-metered apartment buildings. Tenants who participate in the [UMP] have the option of

paying their rent into an escrow account to maintain utility services. The UMP is built on the existing [REAP]."

The DWP "may refer to" the LAHD "any building subject to" the City of Los Angeles's Rent Stabilization Ordinance [RSO] if the DWP has failed to collect a utility bill that is due and provided a "notice of utility shut-off." (§ 155.02, subd. A.) "Within five working days after receiving notification from DWP, LAHD shall give to the landlord(s), any interested parties, and tenants a Notice of Eligibility to place the building into REAP. The Notice of Eligibility shall provide written notification to the landlord(s) of the eligibility of the building for placement into REAP . . . . The Notice of Eligibility shall provide a description of UMP and REAP and specify that within seven calendar days from the date of the notice, the landlord(s) may request a hearing. If no hearing is requested, LAHD shall make a determination on the eligibility of the building for acceptance in REAP. The Notice of Eligibility shall also state that if the building is placed into REAP, LAHD shall establish an escrow account for the deposit of monthly rent payments . . . and that escrow funds may be paid to DWP to maintain utility services to avoid having the building become uninhabitable and in violation of Civil Code Section 1941. et seq." (§ 155.02, subd. B.) "Within ten working days of the acceptance of a building into REAP, [the City] shall establish as a part of the REAP Trust Fund, an account for the building into which tenants may deposit rent payments." (§ 155.05, subd. A.)

Section 155.06 provided, in part, that "[t]he funds paid into the escrow account shall. . . be expended on the following items: [¶] A. The non-refundable administrative fee of $50.00 for each rent payment made into REAP. [¶] B. Funds paid in accordance with a court order. [¶] C. Funds paid to DWP for the amount required to maintain utility services for the date of the referral pursuant to Section 155.02 A of this Code. [¶] D. Funds returned to the landlord(s) when payment arrangements have been reached to the satisfaction of DWP. [¶] E. Excessive escrow funds after payment of DWP delinquent utility bills. [¶] a. Funds returned to the landlord(s) where the landlord(s) has provided LAHD with proof that the deficiencies have been corrected. [¶] b. Funds returned to the

landlord(s) when the landlord(s) is in compliance with any order or citation issued by the City Departments of Building and Safety and Fire, and the County Department of Health Services, the landlord(s) has complied with the unit registration requirement of the RSO, and the building is not in REAP."

Section 155.07, subdivision A provided that the City "shall administratively remove buildings from REAP if each of these findings can be made: [¶] 1. No delinquent DWP bills as reported to [the City] by DWP; [¶] 2. The building has not also been placed into REAP pursuant to Section 162.00 et seq.; and [¶] 3. The landlord(s) has complied with the unit registration requirements of the RSO." "Within ten days of [the City] removing the building from REAP, LAHD will make a demand to the Controller of [the City] for the release of accumulated REAP funds to *the landlord*(*s*)[8] subject to the provision of *the landlord*(*s*)*'* Social Security Number or Tax Identification Number." (§ 155.07, subd. B; italics added.)

2. REAP[9]

At the time plaintiff alleges that the City paid the balance of the escrow funds to KOP—between September 29, 2009, and February 12, 2010, sections 162.00 et seq. set for REAP. Section 162.01, subdivision A, provided that, "It is the purpose of the provisions of this article to provide a just, equitable and practical method, to be cumulative to and in addition to any other remedy available at law, to enforce the purposes of the Housing Code set forth in Section 161.102 and to encourage compliance

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[8] Section 151.02, defined landlord as "[a]n owner, lessor, or sublessor, (including any person, firm, corporation, partnership, or other entity) who receives or is entitled to receive rent for the use of any rental unit, or the agent, representative or successor of any of the foregoing." In addition, the current version of section 155.07, subdivision B, amended by ordinance number 181,643, effective May 31, 2011, replaced the phrase "release of accumulated REAP funds to the landlord(s)" with the phrase "release of accumulated REAP funds to the current landlord(s)."

[9] As noted above, section 155.00, an UMP statute, provided that, "The UMP is built on the existing [REAP]."

by landlords with respect to the maintenance and repair of residential buildings, structures, premises and portions of those buildings, structures and premises."

"Any City or County agency or any tenant may refer any building or residential unit within the scope of this article to the Department for inclusion in REAP if the following conditions are met: [¶] 1. The building or unit is subject of one or more Orders [i.e., orders or notice to comply, correct or abate a condition or violation issued by the Los Angeles County's Department of Health Services; the City's Departments of Building and Safety, Fire or Housing; the California Department of Housing and Community Development; their successors; or any other governmental agency that inspects rental units for the purpose of inspecting for compliance with health and safety laws]; [¶] ii. The period allowed by the Order for compliance . . . has expired without compliance; and [¶] iii. The violation affects the health or safety of the occupants or, if the until is subject to the RSO, the violation results in a deprivation of housing services . . . or a habitability violation . . . ." (§ 162.03.) "After completing its review, the Department shall accept the building or unit into REAP if the conditions set forth in Section 162.03 are met." (§ 162.04, subd. C.)

"Within five working days after the decision accepting a building into REAP has become final, the Department shall establish as part of the REAP Trust Fund an account for the building into which tenants my deposit rent payments." (§ 162.07, subd. A.) Withdrawals may be made from the escrow account, inter alia, "when necessary to prevent a significant diminution of an essential service to the building, including utilities," "when necessary for the correction of deficiencies, including but not limited to those that caused the acceptance into REAP," and when ordered by a court. (§ 162.07, subd. B, 1 and 2; italics added.) "If the City Council terminates the escrow . . .: [¶] . . . [¶] Any remaining funds [after the payment of certain designated fees] shall be returned to *the current landlord*." (§ 162.08, subd. D; italics added.)

C. Analysis

1. The City

a) Timeliness of Government Claim

The City contends that J.R.'s claims against it are barred because J.R.'s government claim against the City was untimely. We disagree.

Government Code section 911.2, subdivision (a) provides that "A claim relating to a cause of action for . . . injury . . . to personal property . . . shall be presented as provided in Article 2 (commencing with Section 915) not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) not later than one year after the accrual of the cause of action."

Although section 155.00, a section under the UMP, provided that, "The UMP is built on the existing [REAP]," section 155.07, subdivision B, also under UMP, provided that any excess escrow funds shall be released to "the landlord(s)" upon termination of UMP. J.R. alleged that the funds should have been release to it instead of to KOP under section 155.07, subdivision B because J.R. was the "landlord" at the time the tenants' rents were paid into the escrow account. "'In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.' [Citation.] '"We begin by examining the statutory language, giving the words their usual and ordinary meaning."' [Citation.] As a general rule of statutory construction, 'where possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' [Citation.] 'If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs.' [Citations.]" (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 398-399.)

J.R. alleged that from the date the first payment was paid into the escrow account to the present, all rental payments paid into the escrow account belonged to and continue

to belong to J.R., and J.R. did not assign, transfer, forfeit or otherwise lose its right to the funds. "Under general principles of property and contract law, a sale or assignment does not transfer the seller/assignor-landlord's claims for back-due rent (preexisting rent defaults) unless expressly so provided in the instrument of transfer. Rents due and owing become personal property (mere choses in action) which are not part of the land and do not pass as incidents of a transfer of real property subject to a lease . . . ." (Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2013) ¶ 2:522.5, p. 2B-158.1 (rev. # 1, 2009); see *Lucky Auto Supply v. Turner* (1966) 244 Cal.App.2d 872, 885-886; *Ginsberg v. Austin* (Fed. Cir. 1992) 968 F.2d 1198, 1201.)

J.R. submitted its government claim against the City on February 26, 2010. A government claim accrues on the date of actual or constructive discovery of the allegedly wrongful act. (*Martinez v. County of Los Angeles* (1978) 78 Cal App 3d 242, 245.) "The reasonableness of a delayed discovery is usually a question of fact but may be a question of law when the allegations of the complaint bearing on whether the plaintiffs had constructive notice of allegedly undiscovered facts are susceptible to only one legitimate inference [citation]." (*Christ v. Lipsitz* (1979) 99 Cal.App.3d 894, 898.)

The City argues that J.R.'s government claim was untimely because J.R.'s claims against the City asserted in the FAC accrued when the property was transferred from J.R. in 2007, pursuant to the tax sale. According to the City, at the time of the tax sale J.R., knew or should have known that "any excess funds in the REAP escrow account would not be paid to" J.R. J.R.'s FAC alleges that it was damaged when the City distributed the excess escrow funds to KOP, and J.R. learned of it after the distribution occurred. There is no evidence in the record consisting of the allegations in the FAC and matters judicially noticed that J.R. knew or should have known at the time of the tax sale that any excess funds in the REAP escrow account would not be paid to it and instead would be paid to KOP.

The City proposes, without argument or authority, that "other reasonable accrual dates could be" when the tenants ceased paying rent into the UMP escrow—at about the time the property was sold pursuant to the tax sale; in October 2008, when the City heard

KOP's motion to remove the property from REAP; or on June 2, 2009, when J.R. requested an accounting of all rents from the City. The tenants ceasing to pay rent into the UMP escrow does not support the proposition that J.R. knew or should have known that the excess escrow funds would not be paid to it and instead was paid to KOP. In addition, there is no evidence in the record that J.R. knew or should have known that in October 2008, the City knew of KOP's motion to remove the property from REAP. Moreover, J.R.'s request for an accounting of all rents from the City does not support the proposition that J.R. knew or should have known that the excess escrow funds would not be paid to it but instead was paid to KOP, particularly because J.R. alleged that it never received a reply to its request for an accounting, and its subsequent telephone messages to the City were never returned.

b) Immunity for Discretionary Acts

The City contends that "[t]o the extent . . . that the City's payment of the funds . . . is considered [a] discretionary [act], the City is immune from liability" to J.R. Government Code section 820.2 states, "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

The City's payment of the excess escrow funds upon the removal of the building from REAP is mandatory, not discretionary. "Within ten days of [the City] removing the building from REAP, LAHD *will* make a demand to the Controller of [the City] for the release of accumulated REAP . . . ." (§ 155.07, subd. B; italics added.) Government Code section 820.2, therefore, does not render the City immune from liability to J.R.

c) Due Process

J.R. contends that the UMP ordinances[10] violate article I, section 7 of the California Constitution which provides that a person may not be deprived of life, liberty, or property without due process of law.[11] The City contends that a damages claim for an alleged violation of due process may not be if an alternative remedy is available.

There is no damages claim for an alleged violation of due process if a meaningful alternative remedy is available to the plaintiff. (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 328 ["The availability of meaningful alternative remedies leads us to decline to recognize a constitutional tort to remedy the asserted violation of article I, section 7(a)"].) J.R. did not allege that there is and was no

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[10] It is unclear at this pleading stage under what ordinance or ordinances the City paid the excess escrow funds to KOP. The only section specifically alleged by J.R. as the basis upon which the City paid KOP the excess escrow funds is under the UMP ordinance—section 155.07, subdivision B. The City's brief states that the property was placed in the "UMP" (in February 2000) (sections 155.00 et seq.) and that J.R. alleged that there was excess funds in the escrow account "when the property was removed from UMP" (sections 155.00 et seq.), and yet the City contends that the excess escrow funds were paid to KOP pursuant not only to sections 155.06, and 155.07, subdivision B, under the UMP ordinance, but also pursuant to section 162.08 under the REAP ordinance.

In addition, as discussed below, the trial court granted KOP's request for judicial notice made in support of KOP's demurrer that included the City's notice of general manager's hearing and notice of acceptance into the "REAP" (sections 162.00 et seq.), dated October 9, 2007, stating that the property was placed into the REAP "because the property [was] the subject of one or more Orders issued by [LAHD], and the time allowed for compliance . . . [had] expired without compliance;" LAHD's notice of removal [of the property] from the "UMP" (sections 155.00 et seq.), dated October 22, 2008; and the LAHD's notice of removal of property from "REAP" (sections 162.00 et seq.), dated October 31, 2008. Also, as noted above, we granted the City's request for judicial notice that included the City's public file providing that on October 29, 2008, the City adopted a resolution to remove the subject property from "REAP" that was established for this property because "the owner(s) of the property . . . was cited for violations which caused the placement of the property into the [REAP]" (sections 162.00 et seq.), and ordered payment of the remaining escrow funds to the "current landlord."

[11] The due process clause of the Fourteenth Amendment to the United States Constitution similarly provides, "no State shall . . . deprive any person of life, liberty, or property, without due process of law."

alternative remedy to a damages claim for an alleged violation of due process available to it. The trial court therefore did not err in granting the City's motion concerning the cause of action for taking of property without due process of law.

d) Negligence

J.R.'s cause of action for negligence, alleged that the City was the custodian of escrow funds belonging to J.R. and owed a duty to J.R. to manage those funds without injury to J.R. J.R. alleged that when the City paid the funds to KOP, the City breached its duty owed to J.R. The City contends that J.R. abandoned its cause of action for negligence by failing to argue it adequately in its briefs**,** and J.R. conceded at oral argument that it did not argue the cause of action for negligence was "viable,' and that the cause of action "is pretty well gone."

J.R. abandoned that cause of action by failing to argue it adequately in its briefs before this court. Courts have said, "'[w]hen an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary. [Citations.]' [Citation.]" (*R.A. Stuchbery & Others Syndicate 1096 v. Redland Ins. Co*. (2007) 154 Cal.App.4th 796, 801-802, fn. 3; *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1615 ["Since [the defendant] does not address the issue, we treat it as abandoned . . . ."]; see Cal. Rules of Court, rule 8.204.)

e) Declaratory Relief

The trial court granted the City's motion for judgment on the pleadings as to the third cause of action declaratory relief contained in its FAC. As with its negligence cause of action discussed above, J.R. abandoned its declaratory relief cause of action by failing to argue it adequately in its briefs before this court. (*R.A. Stuchbery & Others Syndicate 1096 v. Redland Ins. Co*., *supra,* 154 Cal.App.4th at pp. 801-802, fn. 3; *Plotnik v. Meihaus, supra,* 208 Cal.App.4th at p. 1615 see Cal. Rules of Court, rule 8.204.)

The City contends, and J.R. does not oppose, that even if J.R. did not abandon his cause of action for declaratory relief, the trial court did not err in granting the City's

motion as to that cause of action because it merely addresses an alleged past wrong—the City's payment of the remainder of the escrow funds to KOP. We agree with the City.

"'"'"The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject."' [Citation.]" (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1054.) "'[A]n actual, present controversy must be pleaded specifically.' . . . [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80; *Escrow Owners Assn., Inc. v. Taft Allen, Inc., supra,* 252 Cal.App.2d at p. 510 ["an action for declaratory relief is not proper procedure unless an actual controversy exists between the parties"].) "'The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character . . . .'" (*Pacific Legal Foundation v. California Coastal Com* (1982) 33 Cal.3d 158, 170-171.) "The court may sustain a demurrer on the ground that the complaint fails to allege an actual or present controversy, or that it is not 'justiciable.'" (*DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 545.)

"'[W]e have found no authority for the proposition that declaratory relief is proper procedure when the rights of the complaining party have crystallized into a cause of action for past wrongs, all relationship between the parties has ceased to exist and there is no conduct of the parties subject to regulation by the court.' [Citation.] 'There is unanimity of authority to the effect that the declaratory procedure operates prospectively, and not merely for the redress of past wrongs. . . .' [Citation.]" (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 367.)

"Declaratory relief generally operates prospectively to declare future rights, rather than to redress past wrongs. [Citations.] It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs. In short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them. [Citation.]" (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909.) Accordingly, J.R. has not stated facts sufficient to constitute a cause of action for declaratory relief.

f) Leave to Amend

J.R. contends that the trial court abused its discretion in not allowing J.R. to amend the FAC against the City. We agree.

The same rules apply to our review of a judgment on the pleadings as we apply to a review of a dismissal based on the sustaining of a demurrer. (*Gerawan Farming, Inc. v. Kawamura*, *supra*, 33 Cal.4th at p. 32.) The trial court abuses it discretion by sustaining a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967.)

J.R. was never granted leave to amend its allegations against the City in any of its two operative complaints. As to the initial complaint, the City answered it. KOP demurred to it, and the demurrer was sustained with leave to amend. J.R. therefore filed a FAC. The allegations against the City in the original complaint and the FAC, however, are identical.

The basic facts alleged in the FAC are that J.R. owned the UMP escrow funds, the City received and held those funds for the benefit of J.R. and J.R.'s tenant's pursuant to UMP, the City was limited in the uses it could make of the escrow funds, and upon closure of the UMP escrow account the City improperly transferred the excess escrow funds to KOP. J.R. contends that no new facts are required to amend the FAC, and that even though other theories are available, those theories need not be pleaded. But to defeat a demurrer or judgment on the pleadings, a new unpleaded theory cannot be raised. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4; *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541; *City of Hope Nat. Medical Center v. Superior Court* (1992) 8 Cal.App.4th 633, 639.)

J.R. identified theories that it can plead, such as conversion and money had and received. This court may permit such an amendment. (*KFC Western, Inc. v. Meghrig* (1994) 23 Cal.App.4th 1167, 1181-1182.) It appears that amending the FAC here, including to allege different legal theories or new causes of action based on the facts already alleged in the FAC would not subject those new claims to be barred by the

applicable statute of limitations. "An amended complaint is considered a new action for purposes of the statute of limitations only if the claims do not 'relate back' to an earlier timely filed complaint. Under the relation-back doctrine, an amendment relates back to the original complaint if the amendment (1) rests on the same general set of facts; (2) involves the same injury; and (3) refers to the same instrumentality. [Citations.] An amended complaint relates back to an earlier complaint if it is based on the same general set of facts, even if the plaintiff alleges a different legal theory or new cause of action. [Citations.]" (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 276-277.)

2. KOP

a) Timeliness of Government Claim

KOP contends that J.R.'s causes of action against it are barred because J.R. claims against it are derivate of J.R.'s s claims against the City but J.R.'s government claim against the City was untimely. Even if J.R.'s causes of action against KOP would be barred if J.R.'s government claim against the City was untimely, because we hold above that J.R.'s government claim against the City was timely, KOP's contention fails.

b) Restitution, Quasi-Contract Recovery

The fourth cause of action asserted against KOP was entitled "Restitution,[12] Quasi-Contract Recovery." J.R. contends that the trial court erred by sustaining KOP's demurrer to that cause of action on the ground J.R. failed to allege facts sufficient to constitute a cause of action. We agree.

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12 Restitution is not a cause of action. (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.) However, "In reviewing a judgment of dismissal following the sustaining of a general demurrer, we ignore '[e]rroneous or confusing labels . . . if the complaint pleads facts which would entitle the plaintiff to relief. [Citation].' [Citations.]" (*McBride v. Boughton, supra,* 123 Cal.App.4th at p. 387.)

"'Quasi-contract' is simply another way of describing the basis for the equitable remedy of restitution when an unjust enrichment has occurred. Often called quantum meruit, it applies '[w]here one obtains a benefit which he may not justly retain . . . . The quasi-contract, or contract "implied in law," is an obligation created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his former position by return of the thing or its equivalent in money.' [Citation.] 'The so-called "contract implied in law" in reality is not a contract. [Citations.] "Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice." [Citation.]' [Citation.]" (*McBride v. Boughton*, *supra*, 123 Cal.App.4th at p. 388, fn. 6.)

"[R]estitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory (an election referred to at common law as 'waiving the tort and suing in assumpsit'). [Citations.] In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment." (*McBride v. Boughton*, *supra*, 123 Cal.App.4th 388, footnote omitted.) "

"'Under the law of restitution, "[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] A person is enriched if the person receives a benefit at another's expense. [Citation.]" [Citation.] However, "[t]he fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it. [Citation.]"' [Citation.]" (*Durell v. Sharp Healthcare*, *supra*, 183 Cal.App.4th at p. 1370.)

J.R. pleaded facts sufficient to constitute a cause of action for quasi-contract against KOP. J.R. alleged that the money received by KOP was J.R.'s personal property, and it is "unjust" for KOP to retain it.

KOP contends that J.R. had unclean hands and cannot pursue its claim for restitution under a quasi-contract theory. "He who comes into equity must come with clean hands. (*Stein v. Simpson* (1951) 37 Cal.2d 79, 83 [230 P.2d 816] [unclean hands precludes assertion of do equity doctrine and rights of subrogation and restitution].) Unclean hands is an affirmative defense in actions seeking equitable relief. [Citation.]" (*Wilson v. S.L. Rey, Inc*. (1993) 17 Cal.App.4th 234, 245.) "The doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim. [Citations.] The defense is available in legal as well as equitable actions. [Citations.]" (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.)

KOP contends that J.R. had unclean hands because J.R. owned, operated, and maintained the property in a "slipshod" manner thereby "forc[ing] the City to step in and collect the rent and utility proceeds to ensure the Property was receiving at least the minimum level of health and safety services necessary for the protection of its tenants." "Whether the doctrine of unclean hands applies is a question of fact. [Citation.]" (*Kendall-Jackson Winery, Ltd. v. Superior Court*, *supra*, 76 Cal.App.4th at p. 798; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 727 ["the application of the doctrine raises primarily a question of fact"].) The record is devoid of any facts from which a determination that J.R. had unclean hands can be made.

The record provides that while J.R. owned the property, the property was placed in UMP because J.R. failed to pay its utility bills owed to DWP, and it ceased to own the property because the property was sold pursuant to an unsatisfied tax lien. In opposing KOP's demurrer, J.R. stated that it was prepared to amend its FAC, if necessary, to state, "When [J.R.] became the owner of the Property, the [DWP] refused to accept [J.R.'s] utility payments due to DWP's misunderstanding as to the owner of the property. As a result, [J.R.] voluntarily allowed the property to be accepted into the UMP program.'"

In ruling on a demurrer, a trial court may not "make any factual findings at all, including 'implicit' ones." (*Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 839; *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 943 ["[t]he court erred in making that factual determination on demurrer"].) Questions of fact are not amendable to resolution on demurrer. (*Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1240.) The determination of a question of fact requires consideration and weighing of evidence from both sides before it can be resolved. (*Klein v. Chevron U.S.A., Inc*. (2012) 202 Cal.App.4th 1342, 1380-1381; *Chapman v. Skype Inc*. (2013) 220 Cal.App.4th 217, 226-227 ["The question whether consumers are likely to be deceived is a question of fact that can be decided on a demurrer only if the facts alleged in the complaint, and facts judicially noticed, compel the conclusion as a matter of law that consumers are not likely to be deceived"]; *TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1368 [questions of fact may be resolved on demurrer only when there is only one legitimate inference to be drawn from the allegations of the complaint]; *Childs v. State of California* (1983) 144 Cal.App.3d 155, 162-163 [in considering the timeliness of a complaint, the court held that the date of the state's mailing of a notice rejecting appellant's claim was a question of fact not subject to resolution by demurrer].) The allegations of the FAC and matters judicially noticed do not compel us to conclude that J.R. had unclean hands.

c) Conversion

"'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. . . . [Citation.]'" (*Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387; see CACI 2100; *Gruber v. Pacific States Sav. & Loan Co.* (1939) 13 Cal.2d 144, 148 [conversion is the wrongful exercise of dominion "over another's personal property in denial of or inconsistent with his rights therein"].) "'Conversion is a strict liability tort. The foundation of the action

rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial. [Citations.]' [Citation.] The basis of a conversion action '"rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action." [Citations.]' [Citation.]" (*Los Angeles Federal Credit Union v. Madatyan, supra,* 209 Cal.App.4th at p. 1387; see *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395.) Money may be the subject of conversion if the claim involves a specific, identifiable sum; it is not necessary that each coin or bill be earmarked. (*Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681.)

J.R. alleged that a specific, identifiable sum of money had been converted by KOP—$32,921.79. KOP contends, however, that J.R. did not plead that KOP committed a wrongful act to convert the excess escrow funds. KOP also contends that it is not liable to J.R. for conversion because it was an innocent purchaser of the property for value and without notice, actual or constructive. As stated above, however, a defendant's bad faith, negligence, knowledge, or intent is immaterial for a valid conversion claim. (*Los Angeles Federal Credit Union v. Madatyan, supra,* 209 Cal.App.4th at p. 1387; see *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, supra,* 150 Cal.App.4th at p. 395.)

In addition, there is no evidence in the record of the value paid by KOP to acquire title to the property. KOP argues in its respondent's brief, without citation to the record, that "KOP paid $300,000 for the property when sold at the tax sale." J.R. alleged that in October 2007, Kwiat acquired title to the Property, and in November 2007, KOP acquired title to the property from Kwiat pursuant to a quitclaim deed. J.R. does not allege the value paid by KOP to acquire title to the property. In addition, the record belies KOP's unsupported contention that it acquired the property when it was sold at the tax sale. The trial court granted KOP's request for judicial notice in support of its demurrer that

included a tax deed stating that the property was sold by the treasurer and tax collector of Los Angeles County for non-payment of taxes to Kwiat—not KOP.

KOP also cites *Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, at page 546, for the proposition that, "[I]t is a general rule that an innocent purchaser for value and without notice, actual or constructive, that his vendor had secured the goods by a fraudulent purchase, is not liable for conversion." The goods that were purchased in that case, however, were the goods allegedly converted. (*Id*. at p. 543.) There is no evidence in the record that KOP was an innocent purchaser of the property that is the subject of J.R.'s conversion action—the excess funds in the escrow account.

J.R. stated facts sufficient to constitute a cause of action for conversion against KOP. The trial court erred in sustaining KOP's demurrer as to that cause of action.

d) Declaratory Relief

The trial court sustained KOP's demurrer as to the sixth cause of action declaratory relief contained in its FAC. That claim sought a judicial declaration of the owner of the remaining escrow funds, and whether J.R. was damaged.

As with its cause of action for declaratory relief against the City, J.R. abandoned its declaratory relief cause of action against KOP by failing to argue it adequately in its briefs before this court. (*R.A. Stuchbery & Others Syndicate 1096 v. Redland Ins. Co*., *supra*, 154 Cal.App.4th at pp. 801-802, fn. 3; *Plotnik v. Meihaus*, *supra*, 208 Cal.App.4th at p. 1615 see Cal. Rules of Court, rule 8.204.) In addition, J.R. has not stated facts sufficient to constitute a cause of action for declaratory relief against KOP because, like the cause of action against the City, it merely addresses an alleged past wrong—the City's payment of the remainder of the escrow funds to KOP. The trial court did not err in sustaining KOP's demurrer as to the declaratory relief cause of action asserted against KOP.

e) Leave to Amend

J.R. should be given leave to amend. As noted above, the trial court did not err in sustaining KOP's demurrer as to the cause of action for declaratory relief because, inter alia, it did not allege an actual, present controversy. As J.R. is allowed to amend the FAC against the City, JR may also amend to add any theories it may have against KOP.

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court to provide J.R. with an opportunity to amend the FAC against the City and KOP. Plaintiff shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.